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Supreme Court of the United States

October Term, 1955

No. 404

OFFUTT HOUSING COMPANY, a Corporation,

Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents pray that the petition for a Writ of Certiorari to the Supreme Court of Nebraska in the above entitled case be denied.

QUESTION PRESENTED

The United States leased to petitioner for 75 years land adjacent to an Air Base for the construction and operation of housing accommodations. The question presented is whether Respondents may collect from petitioner a tax on the interest of the petitioner in the build-

ings and on household appliances and office equipment owned by petitioner.

STATUTES INVOLVED

In addition to the statutes cited by the petitioner, the case also involves the following statutes and constitutional provisions which are set out in full in the appendix:

The Housing Amendments of 1955, Public Law No. 345, Ch. 783, Sec. 404, 84th Cong. 1st Sess., approved August 11, 1955, and the following Nebraska Constitutional and Statutory provisions:

Article VIII, Section 2, Constitution of the State of Nebraska, and Secs. 77-105, 77-201 and 77-1209, Nebr. R. R. S. 1943.

STATEMENT

Offutt Housing Company, a private, profit-seeking corporation, brought this action against the County of Sarpy, Nebraska, and its Treasurer, to have a 1952 tax assessment and levy on the interest of Offutt Housing Company in the Wherry Housing project adjacent to Offutt Air Force Base, declared void and to have future assessments and levies enjoined. The District Court held for the plaintiff and on appeal the Supreme Court of Nebraska reversed, holding:

"We, therefore, conclude that for the purpose of taxation under the provisions of Section 77-

1209 R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of all the improvements, including the fixtures, appliances, equipment, furniture and other personal property used therein so long as his lease was in force and effect, all of which was taxable as personal property. TO CONCLUDE OTHERWISE WOULD PERMIT PLAINTIFF TO PERPETRATE A SHAM AND FRAUD UPON THE STATE AND ITS GOVERNMENT SUBDIVISIONS." (Emphasis supplied.)

Carl C. Wilson and two other persons of Omaha, Nebraska, on December 22, 1950, organized a perpetual, private Nebraska corporation for the purpose of providing housing for rent or sale by improving, operating, selling, mortgaging or leasing any real estate and personal property. The corporation was authorized to apply for and obtain from the Federal Housing Commissioner, mortgage insurance pursuant to the provisions of the National Housing Act as amended. Its authorized capital stock was $800,000.00, consisting of 80,000 shares of which there were 10 shares of preferred stock of a par value of $10.00 and 79,990 shares of common stock of a par value of $10.00, with a minimum capital requirement of $100,000.00. The profits of the corporation, after providing therefrom dividends of 50 cents per share per annum for the preferred stock, and all reserves, may be applied each year in payment of dividends to common stock holders. On the 29th of July, 1952, the Federal Housing Administration held 10 shares of preferred stock and Carl C. Wilson, Inc., held 25,000 shares of common stock.

Offutt Housing Company, a corporation, on the 18th of January, 1951, entered into a lease whereby the Sec-

retary of the Air Force, representing the United States of America, by authority of the Act of August 5th, 1947, 61 Stat. 775 and the Act of August 8, 1949, 63 Stat. 570 and to effectuate the purpose of Title VIII of the National Housing Act at a consideration of $100.00 per annum, leased to the Offutt Housing Company, a corporation, for 75 years, 63 acres of land (48 acres of which had been donated by the Omaha Chamber of Commerce, Douglas County, Nebraska) to be used for the purpose of erecting, maintaining and operating a housing project of 611 units, in accordance with plans submitted by the Air Force and approved by the Federal Housing Administration, reserving to the Government easements for water lines, electric lines, telephone lines and joint use of 2000 feet of road leading to the public roads of the County of Sarpy and State of Nebraska. Section 8 of the lease specifically provides:

> "That the Lessee shall pay to the proper authority, when and as same become due and payable, all taxes, assessments and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States upon property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the

leased premises prior to the granting of such consent by the Congress of the United States; * * *."

Offutt Housing further agreed in said lease to comply with all applicable laws; to keep the buildings and improvements in good order and repair and save the government harmless from failure in that respect and to keep them insured against fire at its own expense with loss payable to lessee and any security holder jointly as their interests may appear.

On First February, 1951, Offutt Housing Company mortgaged its leasehold situated in the County of Sarpy, State of Nebraska, in a certain ground Lease from the Secretary of Air Force together with the privileges and appurtenances to the same belonging and all of the rents, issues and profits which may arise or be had therefrom and all buildings and improvements of every kind and description now or hereafter erected, or placed thereon, including all fixtures and personal property owned by mortgagor attached or used in or about the building or buildings now erected or hereafter to be erected, in the amount of $4,949,100.00 to Manufacturers Trust Company of New York, which mortgage bore interest at 4% per annum. Offutt Housing Company in its mortgage agreed to pay monthly installments of $22,683.37 plus a sum sufficient to prevent delinquency of premium charges on mortgage insurance, ground rentals, tax assessments, water rents, fire and other hazard insurance premiums, and to pay all taxes levied upon mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgages.

Carl C. Wilson, Inc., constructed the 611 housing units for Offutt Housing Company and received $285,750.00 as compensation. Carl C. Wilson was the president of both corporations. On March 10, 1952, the assessment date, the project was 78% complete. The Units are equipped with household appliances owned by petitioner, which were originally encumbered by chattel mortgages to General Motors Acceptance Corporation and First National Bank of Omaha, in the sum of approximately $110,000.00.

The Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that Offutt Housing Company's net annual income from rentals, with 97 per cent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798.00 and the gross $476,786.00 per year.

Carl C. Wilson, president of Offutt Housing Company, estimated the useful life expectancy of the buildings and improvements at about 35 years.

Military personnel and their families, numbering about 2400, occupy the housing. Rentals range from $89.25 to $51.25 per month. The maximum rental allowance received by military personnel occupying the project is $135.00 per month.

Subsequent to an opinion by the Attorney General of Nebraska and on failure of Offutt Housing Company to file a tax return, the assessor of Sarpy County, Nebraska, prepared and filed a 1952 assessment schedule valuing the property of the Offutt Housing Company at $825,685.00 upon an estimate that the improvements were 75% complete. A tax of $10,783.45 was levied. The as-

sessor also prepared and filed a 1953 assessment schedule in which he valued the property at $2,778,580.00 and assessed it at $1,389,290.00. This resulted in a tax levy of $15,865.69.

REASONS FOR DENYING THE WRIT

I.

There is no real conflict in the law. All of the cases cited as holding Wherry Housing projects not subject to taxation are decisions of trial courts. All courts of Last Resort of the States and all Federal Courts which have considered the question, so far as respondents have determined, have held such projects taxable. *Sheridanville, Inc. v. Borough of Wrightstown*, 125 Fed. Supp. 743; *Fort Dix Apartment Corp. v. Borough of Wrightstown*, No. 11512, decided August 23, 1955 (C. A. 3); *Meade Heights, Inc., v. State Tax Commissioner of Maryland*, 220 Md, 20, 95 A. 2d 280 (1953).

II.

Contrary to the assertion contained in the petition, this is a case in which the State and County Governments provide substantial services to the residents of the Wherry Housing Project. It is elementary that State Government and County Government in our American system provide services to residents of the community which are not available at any other level of government.

The some 2400 residents of the project involved herein frequently avail themselves of local governmental services furnished by the State of Nebraska and Sarpy

County. These people use our local courts for adoptions, guardianships, divorces and almost all other forms of action available to residents of Nebraska, generally. Neither the military establishment nor the Federal Courts afford a forum for many of the remedies and services which these persons necessarily require. The burden placed upon the Courts of Sarpy County is substantial.

Residents of this Wherry Housing Project use the office of the County Treasurer of Sarpy County to procure driver's licenses and licenses for their automobiles. They transfer title to automobiles in the office of the County Clerk. Here they record Conditional Sales contracts and Chattel Mortgages. Many of the documents involved in this action were filed with the Sarpy County Clerk. The Sarpy County sheriffs and the Nebraska Safety Patrol provide police protection when these people are off the Air Base. It is difficult to conceive of a single service of State and County government in Nebraska which is not offered to and received by the military tenants of this housing project.

This project is without the boundaries of any municipality or school district. Hence, the only taxes sought to be imposed are taxes for the support of State and County government. Generally speaking, the residents of this Wherry Housing Project pay no State or local taxes. Their personal property is exempted under the provisions of the Soldiers and Sailors Civil Relief Acts. They pay no tax on their motor vehicles. No service of government has come to respondent's attention which is not both available to and availed of by these people on the same basis as other citizens and residents of Sarpy

County. People create a great many more problems than the blankets which were involved in *Surplus Trading Co. v. Cook*, 281 U. S. 647. The equities are with the respondents.

III.

The United States government is not a party to this litigation. This is a lawsuit between the County of Sarpy on the one side and Offutt Housing Company, a Nebraska corporation organized for profit on the other. The United States did not deem the litigation of sufficient importance to intervene therein.

What will be the effect of the tax which has been levied? It has been estimated that this tax will amount to $2.00 per month on each of the 611 units in the project. The quarters allowance now being paid to the military tenants will still be in excess of the monthly rentals even after the tax is added to existing rentals. How could this affect the re-enlistment rate of the Air Force? The truth is that this petitioner is attempting to hide behind the clothing of the United States in an effort to escape taxation. The net result would be that the military tenant saves approximately $2.00 monthly at the expense of the citizens of Sarpy County and Nebraska who must pay for the governmental service which he receives.

The Government cannot complain if the tax otherwise sustainable increases government costs by its economic incidence. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Alabama v. King & Boozer*, 314 U. S. 1.

In dealing with the argument that the tax would increase rentals, in *Sheridanville, Inc. v. Borough of*

Wrightstown, 125 F. Supp. 743; the Court said, "Since taxes are accepted as an inevitable universal burden, there would seem to be no reason why simply by the circumstances of governmental employment they (the military tenants) should enjoy immunity."

The force of petitioner's argument as to the importance of this question is further weakened by the Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess. approved August 11, 1955, which authorizes the Secretaries of the Armed Services to purchase Wherry Housing Projects under terms and conditions stated in the Act.

IV.

Payment of the tax here is resisted on the ground of exclusive jurisdiction and, as to the buildings, on the further ground of claimed government ownership. It is also urged by way of a last ditch stand that if there was any congressional consent to taxation, the respondents exceeded the limitations thereof.

It is contended that the United States has exclusive jurisdiction of the leased area and that *Surplus Trading Company v. Cook*, 281 U. S. 647, should control. This is a frail precedent from another era. The best that can be said for it is that it has not been specifically overruled. But if it were to be granted that exclusive jurisdiction did exist prior to the lease to the petitioner, there has been one specific and two implied waivers thereof, or, at least, waivers of the insulation against taxation that it is claimed results from exclusive jurisdiction.

It would seem clear to "anyone outside of a court of justice" (to borrow a phrase from Mr. Justice Holmes)

that the government should not be considered to have exclusive jurisdiction over something that it has leased to a private, profit-seeking corporation for a term of 75 years; that Congress by the act of authorizing such a lease impliedly waived the insulation against taxation that is contended for.

In another manner there is congressional waiver by implication. The property is made taxable if it is acquired by the Commissioner of the Federal Housing Administration. Act of Aug. 8, 1949, 63 Stat. 570, 12 U. S. C. A. 1748f. It would seem clear that Congress did not intend that a private, profit-seeking corporation should be in a more favorable position.

Further the lessee's interest in the property is specifically made subject to State and local taxation. Act of August 5, 1947, 61 Stat. 775, 5 U. S. C. A. 626s-6. *Fort Dix Apartments Corp. v. Borough of Wrightstown*, U. S. Court of Appeals, Third Circuit, No. 11512, decided August 23, 1955.

The government does not own the buildings involved in this litigation unless form is to control over substance. The form is the clause in the lease that the buildings become government property as completed. The substance is that for a period of 75 years on payment of a rental of $100.00 per year the lessee has the use and possession of the property and the right to all of the income and profits therefrom. The title of the government under similar arrangements has been termed a "paper one," *Sheridanville, Inc., v. Borough of Wrightstown, et al*, 125 Fed. Supp. 743 and a "bare title," *Gay v. Jemison*, 52 So. (2d) 137, Fla. The Supreme Court of Nebraska took a like

view. *Offutt Housing Co. v. County of Sarpy*, 160 Neb. 320. The paper title that the United States has to these buildings is not sufficient to prohibit their local taxation. *Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, 195 U. S. 375 and *S. R. A. v. State of Minnesota*, 327 U. S. 558.

Petitioner has made much of Mesta. *United States v. Allegheny County*, 322 U. S. 174. One view of Mesta is that there Pennsylvania was trying to tax government property by calling it the property of Mesta. This case is an exact opposite. Here an attempt is made to prevent the local taxation of private property by calling it the property of the government.

The 1947 Military Leasing Act contains a specific consent to the local taxation of all property of the lessee located on the leased premises. No other interpretations would carry out the intent of Congress which was to prevent unfair competition between private enterprises operating on government owned land and those operating on privately owned land. Congressional Record, Vol. 93, Part 8, pages 10491-92.

The property of the petitioner was properly taxed by respondents in conformity with applicable Nebraska statutes.

CONCLUSION

For the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Housing Amendments of 1955, Public Law No. 345, Chap. 783, 84th Congress, 1st Session, approved August 11, 1955, Sec. 404:

Whenever the Secretary of Defense or his designee shall deem it necessary for the purposes of this title, he may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings to acquire by condemnation, any unimproved land, or (with the approval of the Federal Housing Commissioner) and housing financed with mortgages insured under the provisions of title VIII of the National Housing Act as in effect prior to the enactment of the Housing Amendments of 1955. Notwithstanding the provisions of any other law, the price paid for any such unimproved land or housing purchased by the Secretary under this or any other law shall be the fair market value of such land or housing as determined by the Secretary on the basis of an independent appraisal, and, in connection with any agreements to purchase such housing, the Secretary of Defense or his designee may assume, or purchase subject to, any such mortgage. Any such condemnation proceedings shall be conducted in accordance with the provisions of the Act of August 1, 1888 (25 Stat. 357), as amended, or any other applicable Federal statute. Before condemnation proceedings are instituted pursuant to this action, an effort shall be made to acquire the property involved by negotiation unless, because of reasonable doubt as to the identity of the owner or owners, because of the large number of persons, the effort to acquire by negotiation would involve, in the judgment of the Secretary, such delay in acquiring the property as to be contrary to the interest of national defense. In any condemnation proceeding instituted pursuant to this section, the Court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been

filed, and a deposit of the amount estimated to be just compensation has been made, under the first section of the Act of February 26, 1931 (46 Stat. 1421), providing for such declarations. Unless title is in dispute, the courts, upon application, shall promptly pay to the owner, at least 75 per centum of the amount so deposited, but such payment shall be made without prejudice to any party to the proceeding. Property acquired under this section may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.

Article VIII, Section 2, Constitution of the State of Nebraska:

EXEMPTION OF PROPERTY FROM TAXATION. The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Household goods of the value of two hundred ($200.00) dollars to each family shall be exempt from taxation. The Legislature by general law may provide that the increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land. No property shall be exempt from taxation except as provided in this section. (Amended, 1920.)

Sec. 77-105 Nebr. R. R. S. 1943:

"TANGIBLE PROPERTY," "INTANGIBLE PROPERTY," defined. The term "tangible property" includes all personal property possessing a

physical existence, but excluding money. The term "intangible property" includes all other personal property, including money.

Sec. 77-201 Nebr. R. R. S. 1943:

PROPERTY TAXABLE; ACTUAL VALUATION; BASIS OF ASSESSMENT. All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value.

Sec. 77-1209 R. R. S. 1943:

PERSONAL PROPERTY; IMPROVEMENTS ON LEASED PUBLIC LANDS; WHERE LISTED AND ASSESSED. All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner.